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EVIDENCE; LETTERS; ANSWERS ADMITTED WITHOUT PREVIOUS LETTERS. In *New Hampshire Trust Co.* v. *Korsemeyer Plumbing and Heating Co.*, 78 N. W. 303 (Nebraska, February 9, 1899), it was decided that a letter written in answer to another is admissible as evidence if fairly self-explanatory, although the letter which it answers is not offered along with it. The failure to produce the prior letter, it is said, may affect the weight of the letter but not its admissibility. In the opinion, Irvine, C. J., cites in approval the cases of *Barrymore* v. *Taylor*, 1 Esp. 326 (1795), and *De-Medina* v. *Owen*, 3 Car. & K. 72 (1850), and states that Greenleaf on Evidence and Underhill on Evidence both give the rule otherwise, relying on *Phillips Walson* v. *Moore*, 1 Car. & K. 626 (1845).

Upon first consideration this question would necessarily seem to be of almost daily occurrence, yet the text books are nearly bare of

citations. The case of *Walson* v. *Moore*, above mentioned, or *Watson* v. *Moore*, as it appears in the English Common Law Reports, is of no great value. Plaintiffs counsel was stopped by Baron Pollock in the reading of a letter written by the defendant, the opening words having indicated that it was an answer to a letter of the plaintiff, and directed the other letter to be offered first, which was done. This case is given in Greenleaf in a note under section 201. The rule there laid down on its authority is followed by *Lester* v. *Sutton*, 7 Mich. 329 (1859), but so far as can be ascertained by no other cases.

In the first case cited by the court, *Lord Barrymore* v. *Taylor*, 1 Esp. 326 (1795), objection was made to the reading of certain letters unless the letters to which they were the answers were first produced, but Lord Kenyon said that there was no rule of law that required such evidence, that if opposing counsel thought them necessary to explain the transaction, he might produce them as they were in his client's possession. *DeMedina* v. *Owen*, 3 Car. & K. 72, decided by Baron Parke some fifty years after, was also to the same effect. In *Brayley* v. *Jones*, 33 Iowa, 508 (1841), in answer to such an objection, the court said: "This may be the rule if the first letter is necessary to the understanding of the one offered, and will aid in the better understanding of it; or where it appears that the answer may be misunderstood without the letter to which it is a reply being read. But if the letter offered in evidence contains distinct and independent propositions or statements of facts which cannot be misunderstood if read alone, and are in no way dependent on the first letter, we are of opinion that it is admissible without the conditions suggested by counsel."

But is it not sufficient that it be intelligible when taken with the rest of the testimony? In *Beech* v. *The Railroad*, 37 N. Y. 457 (1868) it was held, with much reason, that the meaning of a letter might be ascertained from other evidence in the case, and the other authorities on the admissibility of letters do not make such a qualification.

Stone v. *Sanborn*, 104 Mass. 319 (1870), was an action for breach of promise of marriage. The plaintiff's counsel offered some of defendant's letters and some of plaintiff's, making selections of such as he desired to put in. The defendant objected, but the trial judge permitted them to be read. One of these letters appeared to be in reply and in reference to the contents of a letter of the plaintiff's, which was not put in. On appeal this ruling was affirmed, Gray, J., saying: "If the letters which she introduced showed that they were written in reply to other letters, she might doubtless give in evidence those letters, too, as tending to explain the replies. She was not, however, bound to do so, but might leave it to defendant, upon cross-examination or otherwise, to offer any competent evidence of them or their contents if he wished. If the ruling of Chief Baron Pollock in *Watson* v. *Moore*, 1 C. & K. 625, cited for the defendant, that the party offering the

reply in evidence should put in both the letters or neither, was anything more than an exercise of discretion, as to the order of proof it is more than counter balanced by the opinion of Lord Kenyon in the earlier case of *Barrymore* v. *Taylor*, 1 Esp. 326, and of Baron Parke in the later one of *DeMedina* v. *Owen*, 3 C. & K. 72. In *Crary* v. *Pollard*, 14 Allen, 284 (1867), the reply was held admissible as evidence of notice to the party to whom it was addressed, without producing the letter to which it referred; and the question whether it was admissible for any other purpose was not considered. When a particular communication which refers to a previous one is not introduced as containing the terms of a contract, we see no more reason for obliging the party offering it to put in the previous communication also, when the communications are written than when they are oral. In either case, whether the communications are by successive letters or by distinct conversations, the party introducing the second in evidence may introduce the first also, and if he does not the other party may. The actual custody of the paper does not affect the question which party shall introduce them but only the steps to compel their production."

Again, in *North Berwick Co.* v. *Ins. Co.*, 52 Me. 336 (1863), it was said that the plaintiffs were under no obligations to offer more of the letters of defendants' agent than they should deem conducive to their interest. See, also, *Newton* v. *Price*, 41 Ga. 186 (1870); Taylor on Evidence, Sec. 734; Wharton on Evidence, Sec. 1103.

Where such a letter contains an admission, it must be clear that it should be accepted irrespective of the fact that it is in answer to another. Thus, in *Woggin* v. *Railroad Co.*, 120 Mass. 201 (1876), plaintiffs declared in tort for the conversion of one hundred and fourteen bushels of oats taken by defendant's agent from a freight car to reduce the shipment to the amount at which the car had been billed. Plaintiffs offered in evidence a letter of the agent in reply of one of theirs admitting the removal of the oats, not giving quantity. The Supreme Court held that, as it contained a declaration of an agent within the scope of his authority, it was competent as offered.

In an action of trespass for some cases of rubber shoes, which plaintiff claimed had been consigned on commission, against a constable who had taken possession of them under an attachment against the consignees, certain letters of theirs admitting this fact were offered in evidence. They appeared to be in reply to others written by the plaintiff. Defendants objected to their admission, but the Supreme Court of Vermont held that they were properly received: *Hayward Rubber Co.* v. *Duncklee*, 30 Vt. 29 (1858).

CRIMINAL LAW; FORMER TRIAL; CHANGE IN FORM OF INDICTMENT. *State* v. *Adams*, 78 N. W. 353 (South Dakota). Adams was indicted for rape and convicted. Upon appeal, the Supreme Court first denied him a new trial, but later, since the prosecuting

witness was proved to have been more than sixteen at the time laid in the information, the court arrested the judgment upon its own motion and ordered the defendant to be held in custody ten days for the purpose of such further criminal proceedings as might be instituted against him. The state then brought a new information against Adams for the same offence, charged in identical language, except for the fact that the date of the offence was changed from August 30, 1896, to December 20, 1895. The prisoner was convicted after having entered a plea of former jeopardy; and the Supreme Court, upon appeal, held that the defendant had been tried for the same offence and that his plea should have been sustained.

The court's decision in the present case is open to serious objection. The constitutional provision, according to the authorities, does not mean that a man may not be tried twice for rape, arson or any other offence at law; but, to use the words of Judge Cooley, "by the same offence is not signified the same *eo nomine*, but the same criminal act or omission:" Cooley's Constitutional Limitations, 326 (note). See, also, IV Blackstone, 336. In the present case there were clearly two separate criminal acts, for the defendant was convicted, before a jury, of committing the offence upon August 30, 1896, and was found guilty of a similar offence upon December 20, 1895. The jury's verdict, upon each trial, was final so far as the fact was concerned.

The reasoning of the Michigan Court in the case of *People* v. *Gault*, 104 Mich. 575 (1890), can well be applied to the present case. There a man had been indicted for illegally selling liquor upon May 1st, and set up as a defence the fact that he had been convicted of the same offence committed upon June 30th. The court said: "the offence with which the defendant is charged was complete on May 1st. Had a prosecution then been instituted for this offence and the respondent thereafter arrested for a like offence committed upon June 30th, it is conceded that the prosecution for the prior offence would not constitute a bar, and we are unable to see why, in reversing the facts, the same rule does not obtain." For the same doctrine, see *U. S.* v. *Snow*, 9 Pac. (Utah) 686; *Com.* v. *Walker*, 3 Dist. Ct. Rep. (Pa.) 348 (1894); *Fleming* v. *State* (Tex.), 12 S. W. 605; *Reed* v. *State* (Tex.), 29 S. W. 1085; *Peo.* v. *Sinnell* (N. Y.), 30 N. E. 47; *Evans* v. *State* (Ark.), 15 S. W. 360; *Vowells* v. *Com.*, 83 Ky. 193.

The case that comes most nearly to sustaining the decision in question is that of *Com.* v. *Goff*, 66 Mo. App. 49, (1896). There, to an indictment for illegal liquor selling in September, the defendant pleaded an acquittal of the same offence alleged to have been committed upon November 17, 1893. The plea was sustained, but the court expressly said that there was evidence "tending to show that the prosecuting witness' testimony before the justice and upon this proceeding referred to *the same transaction.*" In the present case, the jury's verdict showed that the same transaction was not in question.

There is another class of cases, illustrated by *Com.* v. *Goulet*, 160 Mass. 276 (1894), where former jeopardy is held to be a good plea. For instance, where a man is indicted for an offence committed upon November 20th and pleads a former acquittal upon an indictment, charging him with the same crime upon July 1st and divers days between that day and November 21st. This case is clearly not analogous to the present. It comes under the rule that a man cannot be tried under a second indictment, where the facts alleged in the second indictment, if proved, would have convicted under the first. How does this rule apply to the present case? Evidence showing an offence committed upon December 20, 1895, could not convict the defendant of a crime alleged to have occurred upon August 30, 1896.

ASSAULT WITH INTENT TO MURDER; EVIDENCE AS TO PREVIOUS DIFFICULTY; SELF-DEFENCE. In *Ellis* v. *The State* (Ala.), 25 So. 1 (1899), appellant was convicted in the court below on an indictment charging assault with intent to murder. It appeared that the prosecutor was going along the highway when the defendant came up and stabbed him with a knife, saying "You told Mr. Chestnut." On a previous night the prosecutor had been put to watch certain property belonging to Mr. Chestnut where thefts had recently occurred. While on guard there he detected defendant and another man approaching, shot at them, but without effect, and reported the matter to his master. This evidence of a previous difficulty was introduced to show motive on the part of the accused. For the defendant the plea of self-defence was made. The verdict in the lower court was for the state. On appeal to the State Supreme Court, Dowdell, J., held, that the use of the word "entirely" by the trial judge in explaining the meaning of self-defence in these terms "that in order to be acquitted on that ground, defendant must be entirely free from fault in bringing on the difficulty" was correct.

The appellate judge's ruling that the defendant must have been *entirely* free from fault if he wishes to set up the claim of self-defence seems at first rather harsh. To say that there is a difference between "entirely free" and simply "free" from fault is not hypocritical (as the judge here insists), but when the personal equation of the average juryman is considered, an important distinction. The following example will illustrate briefly the difference between these two phrases and the force they would have on one not acquainted with legal terms. A man wishing and intending to create a combat with another, meets him on the road and makes insulting and derisive remarks to him on the spot, and the second comer, possibly in the first heat of passion, attacks the first man. In such a case the first man could hardly be said to be *entirely* free from fault, but, nevertheless, his conduct is from a legal point of view faultless, for mere remarks are no justification for an assault.

In other jurisdictions there seems to be a more liberal interpre-

tation of this rule than is shown in the principal case. This is shown in the case of *The State* v. *Maguire*, 69 Mo. 197, where a much more lenient wording of the same rule was accepted. There it was said "a person who brings on a difficulty cannot avail himself of the right of self-defence." And in an Illinois case, *Hulse* v. *Tolman*, 49 Ill. App. 490, on the same point the Appellate Court held, "The law will not permit him (the defendant) to provoke or bring on a difficulty with the plaintiff, and then avail himself of the plea of self-defence." In a previous case in the same state, *Adams* v. *The People*, 47 Ill. 376, the court held that while a man threatened with danger will not be held liable criminally for an honest mistake as to its imminence, yet "at the same time, he has not the right to provoke the quarrel and take advantage of it, and then justify the homicide."

However, it is true that the charge that the defendant must have been "entirely free" from fault, though more strict than the rule in other states, still represents the Alabama doctrine. For example, in another case in that state, *Howard* v. *The State*, 20 So. 365, Haralson, J., held that, "in order to invoke the doctrine of self-defence, the law requires that the defendant should have been free from all fault or wrong doing, which had the effect to provoke or bring on the difficulty." Two other Alabama cases illustrate the same rule—*Bell* v. *State*, 22 So. 526, and *Crawford* v. *State*, 21 So. 214—where (p. 223) "reasonably free" from fault is distinctly said to be erroneous, and that free from all fault or wrong doing is correct.

The question as to whether the defendant must have been absolutely free from fault before he can set up the plea of self-defence, seems to have been little noticed in the text books. In Clark's Criminal Law, p. 156, it is said, under the title of Homicide, "A man will not be deemed the aggressor within this rule merely because his acts provoked the difficulty, unless they were calculated or intended to have that effect."

What has here been called the Alabama Rule is probable, both legally and morally, the more just. No loophole of escape by the plea of self-defence should be permitted a wrongdoer, who had the full intention of quarreling with and injuring another, but who happens to be shrewd enough to adopt the idea of protecting himself by inciting, by insulting verbal expressions, his opponent to strike the first blow. The Alabama courts, in ruling that a defendant who wishes to plead self-defence must be free from fault in povoking the encounter, not only legally in the technical sense, but *entirely* free, have taken a step in the right direction. It may even be that this interpretation of the law has grown up so gradually that the difference between the phrases "free" and "entirely free" is not fully appreciated by the judges. But, be that as it may, this stricter rule must certainly have a beneficial influence, in that it tends to suppress a certain class of criminals ever on the alert to stir up a stabbing affray, as in the principal case, on the slightest provocation.

DIVORCE; EXTRATERRITORIAL EFFECT OF A DECREE OF DIVORCE. In a recent case, *Streetwolf* v. *Streetwolf*, 41 Atl. 876 (1898), the Court of Chancery of the State of New Jersey refused to recognize the extraterritorial validity of a decree of divorce granted by another state under the following circumstances: A husband who had resided many years in New Jersey, on being sued by his wife for a divorce *a mensa et thoro* and alimony, unknown to anyone secretly betook himself to a town in North Dakota, where, ninety days after his arrival, he instituted divorce proceedings against his wife and obtained a decree for an absolute divorce. It was apparent that his sole purpose in going to North Dakota was to secure the decree of divorce, and without any intention of acquiring a permanent domicile there. It appeared also that he engaged in no business in that state, and was, in fact, there only a small portion of the period between his arrival and the institution of the suit. The Court of Chancery set aside the decree upon the grounds that the husband had not acquired a *bona fide*, actual domicile in North Dakota, thereby committing a fraud upon the courts of that state.

A decree of divorce is recognized everywhere when the state has jurisdiction of the parties and determines the status and rights of both parties, and generally when only one of the parties is within the jurisdiction of the state, and the defendant has been summoned or has voluntarily appeared: *Doughty* v. *Doughty*, 28 N. J. Eq. 586 (1876); *Van Fossen* v. *State*, 37 Ohio, 317 (1881). But this is due to the comity between the states, and does not result from the constitutional provision which declares that full faith and credit shall be given in one state to the judicial proceedings in every other; for that provision applies only to divorces granted by a court which has jurisdiction of the parties and subject matter: *Pennoyer* v. *Neff*, 95 U. S. 714 (1877); *People* v. *Baker*, 76 N. Y. 75 (1879). But if the state has jurisdiction of neither of the parties by reason of their being non-resident, the decree can have no effect on their status without the state: *People* v. *Dowell*, 25 Mich. 247 (1872).

What, then, is the test of jurisdiction? It is the domicile of the parties. The domicile must be actual and *bona fide*, and complainant must remain for statutory period: *Hood* v. *State*, 56 Ind. 263 (1880); *Gregory* v. *Gregory*, 76 Me. 535 (1884); *Van Fossen* v. *Van Fossen*, 37 Ohio, 317 (1881). Some states hold that, if the complainant *bona fide* takes up his domicile in another state and has jurisdiction over the parties and subject matter, the divorce is valid everywhere: *Pennoyer* v. *Neff*, 95 U. S, 714 (1877). It results from the comity existing among the states, for no state has the right to dissolve or change the domestic status of persons belonging to other states: *People* v. *Baker*, 76 N. Y. (1879). In New Jersey a decree granted in another state, where the defendant has been summoned and had actual notice, is recognized—*Doughty* v. *Doughty*, 28 N. J. Eq. 581 (1876)—but not on notice by publication: *Flower* v. *Flower*, 42 N. J. Eq. 152

(1886). In New York actual notice, much more notice by publication is not sufficient: *O'Dea* v. *O'Dea*, 101 N. Y. 23 (1886); *People* v. *Baker*, 76 N. Y. 78 (1879). The courts of Iowa recognize the validity of a divorce as to both parties obtained on the domicile of one, with notice of publication to the other: *Van Arsdal* v. *Van Arsdal*, 67 Iowa, 35 (1885); and the same is true in Indiana: *Hood* v. *State*, 56 Ind. 263 (1877). In *Turner* v. *Turner*, 44 Ala. 437 (1876), the court went so far as to recognize a divorce granted on behalf of the husband in Indiana, the wife not having been summoned or having appeared—as to the husband but not as to the wife—and so granted her a divorce. Other states also recognize the validity of a divorce granted one of the parties in another state, while not regarding it as conclusive upon the status or rights of the party within its own jurisdiction: *Cook* v. *Cook*, 56 Wis. 195 (1882); *Wright* v. *Wright*, 24 Mich. 181 (1872); *Stetphen* v. *Stetphen*, 58 Me. 508 (1870); *Barrett* v. *Furling*, 111 U. S. 523 (1883).

The invalidity of a divorce, due to want of jurisdiction, can be shown in any proceeding in any court: *Litowich* v. *Litowich*, 19 Kans. 451 (1878); *Sewall* v. *Sewall*, 122 Mass. 156 (1877); *People* v. *Dowell*, 25 Mich. 247 (1883). In *Reed* v. *Reed*, 52 Mich. 117 (1883), the husband had moved into Indiana and taken up a false domicile and secured a divorce. The Michigan court went behind the record and declared the divorce void. The same was held in *Gregory* v. *Gregory*, 76 Me. 535 (1874).

There is a question whether a decree of divorce obtained by publication may, as other decrees in equity, be subsequently opened by the defendant, who had no actual notice. The following courts hold that it may be: *Lawrence* v. *Lawrence*, 73 Ill. 577 (1874); *Smith* v. *Smith*, 20 Mo. 166 (1854). The following hold the contrary: *McJunkins* v. *McJunkins*, 3 Ind. 31 (1851); *Gilruth* v. *Gilruth*, 20 Iowa, 225 (1866); *O'Connell* v. *O'Connell*, 10 Neb. 390 (1880); *Lewis* v. *Lewis*, 15 Kans. 181 (1875).